2010 WL 1280540 (Del.Ch.) (Trial Motion, Memorandum and Affidavit)
Chancery Court of Delaware.
New Castle County

STORNAWAY CAPITAL, LLC, Plaintiff(s),

v.

Sandra SMITHERS, Defendant,

v.

Shirley H. Brown, Intervener.

No. 18845-VCN.
March 30, 2010.

Notice of Summary Judgment and Memorandum in Support

Shirley H. Brown, Pro se, 1024 Walnut St., Wilmington, DE 19801, (302) 652-9959.

Vice Chancellor John Noble, (18845-NC), Court of Chancery, 417 S. State Street, Dover, DE 19901.

James F. Bailey, Jr. (18845-NC), Bailey & Associates, P.A., Three Mill Road, Suite 306A, Wilmington, DE 19806.

Charles Knothe, Esq., C.A. No. 18845-NC, 3516 Silverside Rd. #14, Wilmington, DE 19810.

Jeffrey S. Goddess, Esq. (18845-NC), Rosenthal, Monhait & Goddess, P.A, 919 Market St., Suite 1401, P.O. Box 1070, Wilmington, DE 19901.

Paul D. Brown, Esq., C.M. No. 9942-NC, 1000 West St. Suite 1540, Wilmington, DE 19801.

Register in Chancery, 5th & King Sts, Wilmington, DE 19801.

On this 23rd day of March 2010, the following Notice of Summary Judgment and Memorandum in Support was served on the parties and their attorneys:

Vice Chancellor John Noble

(18845-NC)

Court of Chancery

417 S. State Street

Dover, DE 19901

James F. Bailey, JR. (18845-NC)

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INTERVENERS' MOTION OF SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT

Comes now, Shirley H. Brown, and moves this Honorable Court Pursuant to Court of Chancery Rule 56 (e) and submit the following Motion for Summary Judgment on the grounds of the Facts, Affidavits, and Evidence in the record will show there are no issues of facts that require a trial by jury.

This motion is made upon Intervener's (Shirley H. Brown), Affidavits, Exhibits, and Evidences of the proceedings of the cases of Stornaway Capital, LLC v Sandra Smithers and In the Matter of Rachel D. Harley, a disabled person, (9942-NC).

Further, Intervener Shirley H. Brown has demonstrated from the use of evidence, affidavits and exhibits as proof, that harm was done to Shirley H. Brown and her mother Rachel Harley, and the other children of Rachel Harley, who are similarly situated.

Exhibit A (1 thru 7) will show Rachel Harley was Administratrix of the property at 1008 Walnut St. for all of her children who had interests in the property as their Father's heirs. Exhibits B, (1 thru 8) and C, (1 thru 10) portrays the trail of misrepresentation, deception, fraud, and exploitation perpetrated against Mrs. Rachel Harley, her estate, and her other children.

Therefore, Shirley H. Brown's Motion for Summary Judgment that is supported by Memorandum and attached exhibits, affidavits, and evidences in the record should be granted, as a *'Matter of Law'* according to Chancery Court rule 56 (e).

<<signature>>

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MEMORANDUM

Background

After the death of Albert G. Harley in 1978, his children signed Estoppels by Deed for the purpose of allowing the real properties Mr. Harley owned to pass to his wife Rachel Harley, Administratrix, unencumbered.

Mrs. Harley has suffered from dementia since 1987; however, in 1991 Sandra Smithers' had Mrs. Harley convey the property 1008 Walnut St. out of Mrs. Rachel Harley's name and into the name of Sandra Smithers. Sandra Harley is one of Mrs. Harleys' daughters and is the sister of Shirley H. Brown.

When Shirley H. Brown questioned the purpose for transferring their Mothers' property at 1008 Walnut Street to her sisters' name Sandra Smithers told Shirley it was because, “Mom was getting forgetful about paying the water, taxes, and insurance”. Sandra Smithers also stated the transference would allow the City to send the bills directly to her and because she operated her beauty salon from property, she would be able to address them promptly. Mrs. Harley had previously allowed several of her other children to use the property for business purposes, therefore the answer was rational and did not present a particular concern.

Sometime in 1996, Sandra Smithers used the property to secure a SBA loan for a business venture called Stepperz, that she and another sister, Mary Harley started. Sandra and Mary borrowed money from Shirley H. Brown because they missed a payment on the loan, but at no time did they disclose that the Walnut St. property was the collateral for the loan. Apparently, that loan helped Mary Harley and Sandra Smithers hide the knowledge for another few months, that they had pledged the property at 1008 Walnut St. for a collateralized loan.

Several months later, when Shirley H. Brown attempted to find out why her mother was constantly crying that ‘somebody was stealing her money’, Mrs. Brown was denied access to her mother, Mrs. Harley. Mrs. Brown sought to investigate the matter by inquiring at the Attorney Generals' office, the Department of Justice, the Division of Aging, the Department of **Elder** **Abuse**,

Sears department store, and the Delaware State Housing Authority (in 2001, Mrs. Harley pledged her personal residence to secure a 'grant/loan' even though she had been diagnosed with dementia ten years prior).

Shirley H. Brown then filed a petition in the Court of Chancery, April 15, 2001 for guardianship of Mrs. Rachel D. Harley, "A Disabled Person", of Wilmington, Delaware pursuant to 12 Del. C., 3901 et seq. (CM9942- NC).

Mary Harley, who was living with their mother (Mrs. Rachel Harley), filed a Counter petition for guardianship (In Matter of Rachel D. Harley, C.M. No. 9942-NC). The Chancery Court appointed Thomas Herlihy III, Esq., Attorney Ad Litem by Order dated March 15, 2001. The Chancery Court granted guardianship of Mrs. Harleys' person to Mary Harley (C.M. 9942-NC).

Shirley H. Brown was not privy to the fact that the 1008 Walnut Street property secured the SBA loan granted to her sisters until 2000; by that time Delaware Trust had already begun proceedings to foreclose on the property. The knowledge of the impending foreclosure further validated Mrs. Brown's assertions of financial exploitation and the stripping of Mrs. Harley's assets by Mrs. Harley's daughters, Sandra Smithers and Mary Harley.

Shirley H. Brown filed a second Petition as Intervener in the action of Delaware Trust v. Sandra Smithers, Civil Action No. 18845-VCN. On September 30, 2004, the two cases (*C.M. No. 9942-NC and Civil. Action. No. 18845-VCN),* were assigned to Vice Chancellor Noble.

On February 12, 2010, Vice Chancellor Noble *granted Shirley H. Brown the permission to Intervene by, "Order" of the Court of Chancery, C.M. No. 18845-VCN, Date Submitted January 31, 2010.* See Exhibit (D).

FACTS

The following facts in this controversy reveal misrepresentation, fraud, secrecy and deception:
1. In 1993, Shirley H. Brown found out that her mother Rachel Harley, who was suffering from dementia since 1987, had transferred her commercial property to Sandra Smithers for $1.00.

2. Sandra Smithers and Mary Harley borrowed ($1,100.00) from Shirley H. Brown to make a payment on an SBA loan for Steperz's, a business venture Sandra and Mary shared.

3. Shirley H. Brown filed a petition for guardianship in the Court of Chancery, April 15, 2001, for the person and property of her Mother (Rachel D. Harley) a "Disabled Person"; an 86-year-old resident of Wilmington, Delaware pursuant to 12 Del. C., 3901 et seq.

4. Court of Chancery appointed Thomas Herlihy III, Esq. Attorney Ad Litem for Mrs. Harley, by Order dated March 15, 2001.

5. Court of Chancery granted guardianship of Mrs. Rachel Harley's person to Mary Harley, C.M. No. 9942-NC.

6. Shirley H. Brown filed a petition in the Chancery Court to intervene in the Civil Action No. 18845-VCN, involving Delaware Trust v. Sandra Smithers.

7. On September 30, 2004, the two cases *CM. No. 9942-NC and Civil. Action. No. 18845-VCN* were assigned to Vice Chancellor Noble.

8. On February 12, 2010, Vice Chancellor Noble; *granted Shirley H. Brown the permission to Intervene by "Order" of the Court of Chancery, C.M. No. 18845-VCN, Date Submitted January 31, 2010.* See Exhibit (D).

ISSUES

The main issues in dispute are as follows:
1. In 1978, the children of Albert Harley signed Estoppels by Deed, which would allow their mother, Rachel Harley to take possession of two properties at 409 Robinson Dr. and 1008 Walnut St.

2. The property at 1008 Walnut Street was conveyed from Rachel Harley to Sandra Smithers for $1.00, in 1991

3. Sandra Smithers related to Shirley H. Brown that the reason for the conveyance was their mother, Mrs. Rachel Harley was getting forgetful about paying the water, taxes, and insurance on the property, and Mrs. Smithers needed to keep those accounts current because her beauty salon was located on the premises.

4. Sandra Smithers and Mary Harley concealed the fact that they used the 1008 Walnut Street property to collateralize their SBA loan in 1996.

5. Shirley H. Brown initiated an investigation in 1999 because (1) Mrs. Harley was constantly crying that 'people were stealing all her money', (2) Mrs. Brown was denied visitation privileges with her mother, (3) the suspicious credit card purchases initiated Mrs. Brown's investigation into her mothers' complaints and (4) attempts to communicate with her sisters (Mary Harley and Sandra Smithers), failed.

6. Shirley H. Brown did not discover the property at 1008 Walnut Street was pledged as security for the SBA loan until 2000.

RULES

The governing rules of the issues in this dispute are:
• Misrepresentation

• Fraud Assumption of Fiduciary duty (*The act of taking something upon yourself*)

• Conversion

• Concealment

• Equitable Estoppels (Estoppels by Conduct, Estoppels by Deed)

• Class Legatee's (Class Action)

• 42 USC 1983 - Deprivation of Rights

• 42 USC 1985 - Conspiracy to interfere with Civil Rights

• 5th and 14th advancement of expenses, Finding; "Corporation's organization documents allowed Corporations Amendments species

APPLICATION

In the Delaware State Court of Chancery the recent cases of *Smith v. Mc Gee and Smitty Me Gee's Inc., Regal Entertainment v. Amaranth LLC, and Xu Hong Bin v. Heckmann Corporation* are analogous to the equity issues that parallel *Stornaway Capital, LLC v. Sandra Smithers;* which are breach of fiduciary duties of due care, conversion, and fraud. Three tolling theories categorize the statute of limitations analogy period: (*1) inherently unknowable injuries; (2) equitable tolling; (3) fraudulent concealment.* Further,

> "If the limitations period is tolled under any of these theories, it is tolled only until the Plaintiff discovers (or exercising reasonable diligence should have discovered) his injury"

The [1] Plaintiff must convince the Court that the Plaintiff was not in possession of facts sufficient to make him suspicious of injury resulting from another's behavior. Fraudulent concealment, unlike the doctrines of inherently unknowable injuries and equitable tolling, "requires an affirmative act of concealment by a defendant - an actual artifice' that prevents the Plaintiff from gaining knowledge of the facts or some misrepresentation that is intended to put a Plaintiff off the trail of inquiry" *Smith v. Mc Gee and Smitty Mc Gee's Inc. (2007),* REGAL ENTERTAINMENT GROUP, Plaintiff v. ARANTH LLC, (*individually and as Representative of a class of all Note Holders*) Defendant

Mrs. Rachel Harley, as the majority shareholder in the interest of the 1008 Walnut Street property, as well as Administratrix, has a fiduciary responsibility to her Children, who are entitled to the interest in 1008 Walnut Street, as heirs of her husband and their father, Albert Harley.

Mrs. Rachel Harley is a representative of a class (Group) of people of which Mrs. Rachel Harley retains majority share, which means Mrs. Harley stands in the best position to be the Certified Representative for all those similarly situated as Plaintiffs (Interveners) regarding the 1008 Walnut Street, Wilmington, DE controversy.

In REGAL ENTERTAINMENT v. AMARANTH LLC, (2009), Chancellor Chandler Denied *Plaintiffs (Xu's) motion for "Summary Judgment seeking to place reasonable terms and conditions as to Directors' right to advancement. And, concluding that the advancement provisions in the bylaws, which qualified the basic advancement rights in the Charter, Did not Conflicted with the Charter."*

The analogy in *Xu Hong Bin v. Heckmann Corporation and Stornaway Capital LLC v. Sandra Smithers* is the issue of the *"Assumption of Fiduciary Duty."* [2] Sandra Smithers' assumption of Fiduciary duty by conveying Mrs. Harleys' 1008 Walnut Street property title over into her own name for $1.00 was based on convenience and relationship (Mother and Daughter), and constitutes *Misrepresentation, Conversion, and Fraud* The conversion was unreasonable in terms and conditions and lacked any legal basis according to Mrs. Harley's mental capacity as a "Disabled Person", and did in fact create a conflict of interest. Mrs. Rachel Harley lacked the mental capacity to attend to her affairs and fiduciary duties as Administratrix of her late husband, Albert Harley (*Xu Hong Bin v. Heckmann Corporation, (2010)).*

CONCLUSION

The record clearly demonstrates that Shirley H. Brown's affidavits, Exhibits of Evidence (A) through (D), support her claims and allegations of Misrepresentation, Fraud, Conversion, Concealment, and Equitable Estoppels, or Estoppels by conduct, and concealment.

Three cases have been provided of recent Delaware Court of Chancery decisions by Chancellor Chandler and Vice Chancellor Noble, and are analogous with the *STORNAWAY CAPITAL LLC v. SANDRA SMITHERS* case. Sandra Smithers' assumption of acting in the fiduciary because of her Mother and Daughter relationship did create a legal duty to protect her Mother (Rachel Harley) from harm or injury, as a "Matter of Law."

Shirley H. Brown files for[3] Summary Judgment pursuant to Delaware Court of Chancery Rule 56 and 56 (e), and contends that the core terms in the cases *1. Smith v. Mc Gee and Smitty Mc Gee's Inc, 2. Regal Entertainment v. Amaranth LLC, and 3. Xu Hong Bin v. Heckmann Corporation,* share the same decision rationale that applies to the present case of *Stornaway Capital LLC v. Sandra Smithers,* of the doctrine of *"Stare Decisis."*

Therefore, Rule 56 (e) obligates the opposing Parties to dispute each of the affidavits and Exhibits submitted into evidence (A Thru D), and if the opposing Parties fail todo so, Shirley H. Brown is entitled to *Summary Judgment as a "Matter of Law."*

Shirley H. Brown prays that this Court of Chancery, being a Court of equity, consider this evidence and find that relief should be granted to the Intervener, Shirley H. Brown, as a "Matter of Law".

<<signature>>

Shirley H. Brown

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Footnotes

1 (Blacks Law Dictionary, Pg. 273, 1st Ec.) At law. An unauthorized assumption and exercise of the rights of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of the owner's rights.

2 Conversion, - The transference of one species of property into another, as money into land or land into money. (Blacks Law Dictionary, Pg. 273, 1st Ed.)

3 Rule 56 (e), states in pertinent parts that: "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party."

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